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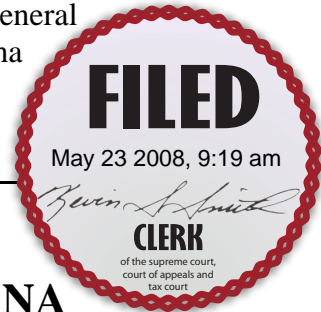
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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM D. ABERNATHY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A03-0709-CR-458

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 20D04-0608-FC-187

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In challenging his conviction for possession of cocaine as a class D felony, William Abernathy presents two issues,¹ which we reorder as follows:

- I. Whether the trial court abused its discretion in admitting into evidence the cocaine found at the scene; and
- II. Whether the evidence was sufficient to prove that he knowingly or intentionally possessed cocaine.

We address the admissibility question first because, if meritorious, it could make review of the sufficiency question unnecessary. We affirm.

Facts and Procedural History

The facts most favorable to the conviction reveal that around 4:45 a.m. on August 25, 2006, Fort Wayne Police Officer Scott Straub was patrolling the southeast quadrant of the city in his unmarked squad car. Officer Straub had received information to be on the lookout for Dustin Smart, a white male suspected of dealing in cocaine and being in possession of a stolen handgun. Tr. at 111-12. At the corner of two streets in an area known for drugs, prostitution, and weapons, Officer Straub observed a white male standing next to a tan older car. *Id.* at 110-11. Officer Straub drove around the block to take a second look while calling

¹ After the State filed its Appellee's Brief, Abernathy sent to his appellate counsel a one-page "Amended Issue On Appeal," alleging ineffective assistance of trial counsel. This filing, which was forwarded to us, is essentially a reply brief. A party may not raise a new issue in a reply brief, let alone do so without cogent argument. See *Chupp v. State*, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005) ("An issue not raised in an appellant's brief may not be raised for the first time in a reply brief."); Ind. Appellate Rule 46(A)(8)(a). Accordingly, his argument is waived. Moreover, we note that because ineffectiveness claims often require the development of new facts not present in the trial record, it is preferable to present claims of ineffective assistance of counsel in post-conviction proceedings. See *DeWhitt v. State*, 829 N.E.2d 1055, 1065 n.7 (Ind. Ct. App. 2005).

in for a more detailed description of Smart. *Id.* at 112. By the time he returned to the corner, the man and tan vehicle were gone. Driving in the direction he guessed the tan car may have gone, Officer Straub spotted the same tan car parked on a nearby street. Officer Straub circled the block and parked his unmarked squad car approximately forty feet from the tan car such that his police vehicle was facing the front of the tan car.

Although he did not activate his police lights or siren, Officer Straub left the squad car's headlights on. *Id.* at 124. In addition, streetlights illuminated the scene. *Id.* at 134. One person, a large black male later identified as Abernathy, exited the tan car and began walking briskly toward the unmarked police car's driver's door. *Id.* at 117-18. Officer Straub, dressed in full uniform, then emerged from his vehicle. At that moment, Abernathy startled, asked who Officer Straub was, and abruptly changed direction. That is, he "dart[ed] to the passenger side of [Officer Straub's] squad car[.]" *Id.* at 118-19. As Abernathy veered toward the opposite side of the patrol car, he was "reaching towards his waistband" or pockets. *Id.* at 119-20. Believing Abernathy was drawing a weapon, Officer Straub said, "Stop. Show me your hands," and drew his weapon. *Id.* at 122. Abernathy did not stop what he was doing; instead, he continued reaching in his waistband, moved along the side of the patrol car, threw something on the ground, and then put his hands up. *Id.* at 130, 132-33.

Officer Straub and Abernathy met at the trunk area of the squad car, where Officer Straub explained that he thought Abernathy had a gun. *Id.* at 135. The officer said he would like to handcuff Abernathy to make sure he was unarmed; Abernathy agreed. Abernathy stated that he did not have any guns but did have keys and cell phones. *Id.* at 136. While placing the handcuffs on Abernathy, Officer Straub saw an "article lying by [the] passenger

side door” of the car, approximately where Abernathy had dropped/thrown the object moments before. *Id.* at 137. As Officer Straub picked up the object, which was a baggie, Abernathy said, “What’s that? That ain’t my crack.” *Id.* at 137-39. The baggie, which tests later revealed, did contain crack cocaine, was neither dew-covered nor crushed. *Id.* at 144-45. Officer Straub stated that had the baggie been in that spot when he parked, his squad car would have run over it. *Id.*

On August 30, 2006, the State charged Abernathy with class C felony possession of cocaine. On May 10, 2007, the State amended the charge to a class D felony. On June 22, 2007, the court held a suppression hearing at the conclusion of which it denied Abernathy’s motion to suppress the cocaine. Six days later, a jury found Abernathy guilty as charged. The following month, the court ordered him to serve a three-year prison sentence. He now appeals.²

Discussion and Decision

I. Admission of Cocaine

Arguing that the court abused its discretion by admitting the cocaine into evidence, Abernathy cites both federal and state constitutional provisions regarding search and seizure. He asserts that when Officer Straub told him to stop and drew his weapon, Abernathy was no longer free to go. In order to legally stop Abernathy, Officer Straub needed a reasonable suspicion that he was, had been, or was about to be engaged in criminal activity. Abernathy contends that because Abernathy was clearly not Smart, nor was he armed, and because

Officer Straub saw no criminal activity, Officer Straub's seizure was illegal. The cocaine, which he claims was found as a result of the improper seizure, was not admissible. In the alternative, he argues that even if he abandoned the cocaine, it was not admissible because the abandonment was precipitated by illegal police conduct.

Although he originally challenged the admission of the cocaine through a motion to suppress, Abernathy appeals following a completed trial and challenges the admission of such evidence at trial. Thus, the issue is "appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We have indicated that our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *trans. denied*. We do not reweigh evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *trans. denied*. We also consider uncontested evidence favorable to the defendant. *See id.*

Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of Indiana's Constitution provide "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" by the Government. U.S. Const. Amend. IV; Ind. Const., art. I § 11. Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668, 676 (Ind.

² Page nine of the Appellee's Brief is missing from the copies of the Appellee's Brief. The State's original Appellee's Brief does contain the missing page, hence we were able to review the full submission.

2005). If a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. *Coleman v. State*, 847 N.E.2d 259, 262 (Ind. Ct. App. 2006), *trans. denied*.

“While almost identical in wording to the federal Fourth Amendment, the Indiana Constitution’s Search and Seizure clause is given an independent interpretation and application.” *Myers v. State*, 839 N.E.2d 1146, 1152 (Ind. 2005). To determine whether a search violated the Indiana Constitution, our courts must evaluate the reasonableness of the police conduct under the totality of the circumstances. *Id.* This requires consideration of both the degree of intrusion into the subject’s ordinary activities and the basis upon which the officer selected the subject of the search. *Id.* This analysis “turn[s] on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and 3) the extent of law enforcement needs.” *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

One exception to the warrant requirement is that a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause if, based upon specific and articulable facts together with rational inferences from those facts, the official intrusion is reasonably warranted, and the officer has reasonable suspicion that criminal activity “may be afoot.” *Moultry v. State*, 808 N.E.2d 168, 170-71 (Ind. Ct. App. 2004) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

Abandoned property is another exception to the warrant requirement. *See, e.g., Wilson v. State*, 825 N.E.2d 49, 51 (Ind. Ct. App. 2005). That is, even if a police officer

lacks a warrant or reasonable suspicion to stop a defendant, evidence may be admissible if the defendant abandoned it prior to the seizure. *See Gooch v. State*, 834 N.E.2d 1052, 1053 (Ind. Ct. App. 2005) (citing *California v. Hodari D.*, 499 U.S. 621, 623 (1991)), *trans. denied*. “By the same token, if property is abandoned after a citizen is improperly detained, the evidence is not admissible.” *Gooch*, 834 N.E.2d at 1054; *see also State v. Pease*, 531 N.E.2d 1207, 1211-12 (Ind. Ct. App. 1988) (holding that because an improper frisk forced the defendant to abandon drugs, that evidence was inadmissible). The seizure of an individual does not occur, however, if the subject does not yield to a show of authority or an application of physical force. *Wilson*, 825 N.E.2d at 52 (citing *Hodari*, 499 U.S. at 626).

We find *Gooch* and its discussion of *Wilson* particularly helpful in resolving the present case.

On appeal, Wilson contended that his motion to suppress should have been granted because the cocaine was found pursuant to an improper investigatory stop. We held that Wilson had abandoned the cocaine prior to its seizure by the police officers. In affirming Wilson’s conviction, we observed that

Wilson dropped the bag underneath the parked car while riding his bicycle away from the officers. He had not complied with their request that he stop. Only after Wilson dropped the bag and declined to comply with their request did the officers use force to remove Wilson from the bicycle and handcuff him. When Wilson threw the black cloth bag to the ground, the items were subject to lawful seizure by the police. Wilson had not been ‘seized’ at the time he dropped the cloth bag; therefore, the bag containing cocaine was not the product of a seizure and was properly admitted into evidence over Wilson’s Fourth Amendment objection.

Here, the record shows that Gooch continued walking after Officer Lomax’s initial command for him to stop. Gooch then proceeded to crouch behind a parked vehicle, whereupon Officer Lomax ordered Gooch to stand and show his hands. Gooch did not immediately comply, and Officer Lomax

saw Gooch toss something near or under the vehicle. Only then did Gooch stand and show his hands. Thereafter, Officer Lomax apprehended Gooch, handcuffed him, and spotted the bag of cocaine on the ground.

Given these circumstances, it is apparent that even though Officer Lomax was attempting to restrain Gooch's activities, Gooch's freedom was not interrupted, inasmuch as he failed to initially obey Officer Lomax's instructions. Only after Gooch tossed the bag did Officer Lomax use force to restrain and handcuff Gooch. As a result, the bag was subject to a lawful seizure by the police when he tossed it to the ground. Moreover, Gooch had not been "seized" at the time he tossed the bag of cocaine, so the drugs were not the product of an illegal seizure. Hence, the cocaine was properly admitted into evidence, and the trial court properly denied Gooch's motion to suppress.

834 N.E.2d at 1054-55 (citations omitted).

Similarly, when Officer Straub commanded Abernathy to stop and show his hands, Abernathy did not comply with the requests. Rather, he continued walking briskly along the side of the patrol car and reaching toward his waistband. Not until *after* he threw the baggie of cocaine to the ground did Abernathy stop and show his hands. Thus, even though Officer Straub was attempting to restrain Abernathy's activities, Abernathy's freedom was not interrupted inasmuch as he failed to initially comply with Officer Straub's instructions. Abernathy was not "seized" at the time he tossed the cocaine. Thus, the cocaine was not the product of a seizure, legal or otherwise.

We are equally unmoved by the argument that Abernathy dropped the cocaine as a result of or in anticipation of illegal police conduct. We again look to *Terry* for guidance. *Terry* permits a reasonable search for weapons for the protection of the police officer, where the officer has reason to believe that he is dealing with an armed or dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. *Terry*, 392 U.S. at 27. The officer need not be absolutely certain that the individual is armed; the issue is

whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Id.* The *Terry* stop and frisk rule applies to cases involving a brief encounter between a citizen and police officer on a public street. *State v. Atkins*, 834 N.E.2d 1028, 1032 (Ind. Ct. App. 2005), *trans. denied*.

To review, in the pre-dawn hours, Officer Straub was patrolling an area known for weapons and drugs. He believed the occupant of the tan car may have just been in contact with a man suspected of both dealing in cocaine and being in possession of a stolen handgun. Abernathy, a large man, emerged from the tan car, walked quickly toward Officer Straub's unmarked squad car, suddenly changed directions upon seeing the officer's uniform, positioned himself so the squad car was between Officer Straub and himself (Tr. at 119, 121), and reached his hand toward his waistband. Under these circumstances, a reasonably prudent person would be warranted in the belief that his safety or that of others was in danger. As such, Officer Straub was justified in requesting Abernathy to stop.

Abernathy has demonstrated no violation of his rights under either federal or state search and seizure law. The court did not abuse its discretion when it denied the motion to suppress or when it admitted the cocaine into evidence at trial.

II. Sufficient Evidence to Support Conviction

Abernathy challenges the sufficiency of the evidence. Specifically, he asserts that the baggie could have been on the ground prior to his arrival; it was too dark for the officer to have seen either his hands or if he threw something; he denied throwing anything; no fingerprint evidence was presented; and his hands were too full to have been holding the baggie.

When reviewing the sufficiency of evidence to establish the elements of a crime, we consider only the evidence and reasonable inferences drawn therefrom that support the conviction. *Cherrone v. State*, 726 N.E.2d 251, 255 (Ind. 2000). “We do not reweigh evidence or judge the credibility of witnesses and will affirm the conviction if there is probative evidence from which a reasonable [fact-finder] could have found the defendant guilty beyond a reasonable doubt.” *Id.* A criminal conviction may be based solely on circumstantial evidence. *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995).

To convict Abernathy, the State had to prove beyond a reasonable doubt that he knowingly or intentionally possessed cocaine. Ind. Code § 35-48-4-6(a). Considering the evidence as set out in the Facts and Procedural History section *supra*, and the reasonable inferences drawn therefrom that support the conviction, we easily conclude that sufficient evidence was presented from which the jury could have found Abernathy guilty of cocaine possession as a class D felony. *See Hicks v. State*, 609 N.E.2d 1165, 1167 (Ind. Ct. App. 1993) (affirming cocaine possession where police had observed defendant drop package later found to contain cocaine as police approached and defendant commented, “I didn’t think you saw me.”).

Abernathy’s contention that the baggie could have been on the ground for a while is controverted by testimony that the baggie was not dewy and would have been flattened by the squad car’s tire if it had been there before the officer parked. It is not our job to reweigh evidence in this regard. As for visibility and Abernathy’s claim that he did not throw anything, testimony revealed that streetlights were on and that the officer saw Abernathy throw the baggie. We will not invade the “unique province” of the jury to assess witness

credibility. *Gantt v. State*, 825 N.E.2d 874, 878 (Ind. Ct. App. 2005). Regarding the lack of fingerprint evidence, the State is not required to introduce fingerprint evidence. Instead, the State may attempt to prove the required elements of a crime however it sees fit. As for Abernathy's claim that his hands were too full to have held a baggie as well, again this was up to the jury to believe or disbelieve. In sum, we cannot accept Abernathy's invitation to reweigh evidence or judge credibility.

Affirmed.

BARNES, J., and BRADFORD, J., concur.